SUPREME COURT, U. S.

No. 71-1165

Supreme Court, U. S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1971

ROBERT HARPER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Question Presented for Review	2
Constitutional Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	6
Conclusion	9

Appendix A—Opinion of the Court Below ..... App. 1

Appendix B—Judgment Order Sought to be Reviewed ..... App. 10

Appendix C—Denial of Petition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc ..... App. 11

CITATIONS

Cases

	PAGE
Burdeau v. McDowell, 256 U.S. 467 (1921)	6
Elkins v. United States, 364 U.S. 206 (1960)	7
McNabb v. United States, 318 U.S. 332 (19)	6
N.L.R.B. v. South Bay Daily Breeze, (9th Cir. 1969) 415 F.2d 360	7, 8
Olmstead v. United States, 277 U.S. 438 (19)	7
People v. Botts, 250 Cal.App.2d 478, 58 Cal.Rptr. 412	8
People v. Williams, 53 Misc.2d 1086, 281 N.Y.S.2d 251	8
State v. Wingo (6th Cir. 1969) 416 F.2d 857	7, 8
United States v. Goldberg (3d Cir. 1964) 330 F.2d 30, cert. den. 377 U.S. 953	7, 8
United States v. McGuire, (2d Cir. 1967) 381 F.2d 306, cert. den. 389 U.S. 1053	7, 8
Williams v. United States (6th Cir. 1960) 282 F.2d 940	7

In the
Supreme Court of the United States

OCTOBER TERM, 1971

NO.

ROBERT HARPER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

Petition For Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

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Petitioner, Robert Harper, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this cause on November 10, 1971.

Opinion Below

The opinion of the Court of Appeals is as yet unreported. It is reprinted as Appendix A, infra.

Jurisdiction

The judgment of the Court of Appeals (Appendix B, infra) was entered on November 10, 1971. A timely Petition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc was filed, but was denied on February 14, 1972. (Appendix C, infra) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented For Review

Where records of a business enterprise are stolen by an employee of that enterprise, and turned over to the government by that employee in exchange for a promise of immunity from prosecution, may those records be admitted into evidence in a federal prosecution of the principal of that enterprise?

Constitutional Provisions Involved

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated."

Statement

Petitioner Robert Harper was indicted with one Thomas Upshaw by the Grand Jury of the United States District Court for the Northern District of Indiana, Hammond Division. The indictment charged eleven counts of knowingly subscribing false Internal Revenue Form 730's, in

violation of 26 U.S.C. §7206(1)[1] and 18 U.S.C. §2.[2] A jury was waived, and Petitioner was convicted on each of the eleven counts. Upshaw, his co-defendant, was acquitted on each of the counts. Petitioner was sentenced to a total of five years imprisonment on Counts I and II, and fined $10,000.00. Imposition of sentence on the remaining nine counts was suspended, and Petitioner was placed on five years' probation to commence upon his release from incarceration.

The false tax wagering forms had been filed by Tri-State Enterprises, a policy wheel operation. At trial, the government's evidence consisted primarily of the records of the policy operation for the period covered in the indictment, and the testimony of one Mattie Turnipseed, a former employee of Tri-State Enterprises.

Prior to trial, Harper and Upshaw had moved to suppress these records, which were alleged to be records of wagers received by Petitioner Harper. The motion alleged that the records had been taken from Petitioner without authorization and made available to the government, by a person acting under the encouragement and control of government agents. The motion further alleged that the seizure of these records was accomplished without a warrant, and in violation of rights guaranteed Petitioner by

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[1] This section provides in pertinent part that: "Any person who wilfully makes and subscribes any return * * * which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter * * * shall be guilty of a felony and, upon conviction, shall be fined not more than $5,000.00 or imprisoned not more than three years, or both * * *."

[2] This section, in substance, makes punishable as a principal one who aids, abets, counsels, commands, induces or procures the commission of an offense, or who wilfully causes an act to be done which, if done directly, would be an offense.

the Fourth Amendment to the Constitution of the United States. (R. 36-7; A. 19, 20)[1] A hearing on the motion was held concurrently with the trial.

Mattie Turnipseed testified that she had worked for Tri-State Enterprises as a bookkeeper through June, 1968. Tri-State would conduct three daily drawings to determine winning numbers, and she kept daily records of the operation. She kept a record of monies received as bets for each drawing, the monies disbursed on the winning numbers, and the initials of the "pick-up-men" who solicited each bet. These sums would be tofaled after each drawing, and a copy of the records and the totals would be given to Petitioner Harper. (R. 61, 77-82; A. 62, 73-5) Mattie Turnipseed would then use these total figures to determine daily and weekly wagering figures, and to compute the payroll for the "pick-up men."

Mattie Turnipseed was supposed to destroy these records after the payroll had been prepared. This was the practice of the business. (R. 93; A. 84) However, she did not destroy the records for the period August, 1967 through June, 1968. Instead, she stole the records, and stored them in her home. (R. 94; A. 84)

Mattie Turnipseed was approached by two government agents on February 13, 1969. They requested her cooperation, and asked that she give them the Tri-State Enterprise records. She refused, and referred the agents to her attorney. (R. 120-1; A. 9) The agents met with her lawyer, and discussed the possibility of granting her immunity from prosecution. (R. 158-9; A. 118) There were also discussions concerning her receiving an informer's reward.

The agents visited Mattie Turnipseed again on February 26, 1969, and again on February 28, 1969. (R. 129-132; A.

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[1] "R. ...." references are to the page of the trial record filed in the Court of Appeals. "A. ...." references are parallel, and refer to the page of the Appendix filed in the Court of Appeals pursuant to the Federal Rules of Appellate Procedure.

105-7). They told her that before she could be promised immunity, the records would have to be evaluated. Still she refused to relinquish the records, and again referred the agents to her attorney. Finally on February 28, 1969, in response to a promise that if she testified for the government she would be given immunity, she permitted the agents to take the records from her home. (R. 207; A. 151)[1] On April 29, 1969, she signed a prepared application for an informer's reward which had been brought to her by one of the agents (R. 175-6; A. 124).

These records, which had been stolen from Tri-State Enterprises and given to the government in response to a promise of immunity, were introduced, over Petitioner's timely objection, as Government's Exhibits 13 through 512. They showed that the gross receipts of the operation for the eleven-month period in question totalled $2,170,341.77, on which a tax of $217,034.18 was due. The tax paid during the period, as evidenced by Government's Exhibits 1 through 11, the Form 730's filed by Petitioner, totalled $18,808.00.

Nicholas V. Angel, the accountant who prepared the Form 730's, testified that the forms were prepared for and on behalf of Petitioner. He said that the information on the forms was generally transmitted to his office by the co-defendant Upshaw. (R. 32-3; A. 47) It was undisputed that Petitioner Harper signed each of the forms, but there was no testimony as to whether the forms were prepared before the Petitioner signed them, or whether he signed them in blank.

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[1] Although the government had obtained these records in February, 1969, Mattie Turnipseed was served with a subpoena duces tecum in April, 1969, requiring production of the records before a grand jury. She appeared without the records, and testified to her participation in the policy operation. Shortly thereafter she applied for, and received a job with the Internal Revenue Service. (R. 167; A. 122)

Reasons for Granting the Writ

The question here at issue was most succinctly put by Mr. Justice Brandeis, dissenting in *Burdeau* v. *McDowell*, 256 U.S. 465, 476. Justice Brandeis, in an opinion in which he was joined by Mr. Justice Holmes, posed the question:

> Plaintiff's private papers were stolen. The thief, to further his own ends, delivered them to the law officer of the United States. He, knowing them to have been stolen, retains them for use against the plaintiff. Should this court permit him to do so? *Burdeau* v. *McDowell*, 256 U.S. 465, 476, Brandeis, J., dissenting.

The majority in *Burdeau* had answered this question in the affirmative, finding no intention in the framers of the Constitution that the Fourth Amendment limit private action. The fifty years of judicial history which has followed that decision however, while not disturbing its constitutional basis, has created uncertainty as to the answer which this Court would give were it again faced with the question posed by Mr. Justice Brandeis.

Specifically, in *McNabb* v. *United States*, 318 U.S. 332, Mr. Justice Frankfurter, speaking for the Court, described a non-constitutional ground for a prohibition against governmental use of evidence unlawfully obtained by a private party. He said:

> The principles governing the admissibility of evidence in federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts * * * this court has from the very beginning of its history formulated rules of evidence

to be applied in federal criminal prosecutions. 318 U.S. 332, 341.

Thereafter in *Elkins* v. *United States*, 364 U.S. 206, in the exercise of the supervisory power described in *McNabb*, the Court overturned the "silver platter" doctrine, and prohibited the use of evidence illegally seized by state officials in federal criminal prosecutions. Fundamental to that decision was "* * * the imperative of judicial integrity." *Elkins* v. *United States*, 364 U.S. 206, at 222. Thus, Mr. Justice Stewart could quote with the full approval of the Court the statement of Mr. Justice Brandeis, dissenting in *Olmstead* v. *United States*, 277 U.S. 438, 485, that:

> "'Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites anarchy. To declare that in the administration of criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against this pernicious doctrine this court should resolutely set its face." 277 U.S. at 485'

The issue remaining after *Elkins*, namely whether the "imperative of judicial integrity" suffers any less where an illegal seizure of evidence is accomplished by a private party rather than a state official, has not received uniform treatment by the federal circuits. The weight of opinion is that *Burdeau* remains untouched by *Elkins*. See e.g. *United States* v. *Goldberg* (3d Cir. 1964), 330 F.2d 30, cert. den. 377 U.S. 953; *United States* v. *McGuire* (2d Cir. 1967), 381 F.2d 306, cert. den. 389 U.S. 1053; *Stone* v. *Wingo* (6th Cir. 1969), 416 F.2d 857; *N.L.R.B.* v. *South Bay Daily Breeze* (9th Cir. 1969), 415 F.2d 360. However the Sixth Circuit, in *Williams* v. *United States* (6th Cir. 1960), 282 F.2d 940, has stated that *Burdeau* was overruled by *Elkins*.

Indicative of the uncertainty as to the continued validity of *Burdeau* is the fact that even those courts which purport to rely on *Burdeau* take care to distinguish factually that decision. Thus, in *United States* v. *Goldberg*, 330 F.2d 30, cert. den. 377 U.S. 953, where corporate records were stolen and given to the government, the court differentiated *Burdeau*, stating, "* * * the records were not personal records of the appellant, but belonged to the various corporations concerned and since they were, the appellant had no basis on which to object to their admission." 330 F.2d at 35. Similarly in *Stone* v. *Wingo*, 416 F.2d 857, where a private insurance investigator searched the premises of the defendant and found incriminating evidence, the Court made a specific finding that the defendant had consented to the search. In *United States* v. *McGuire*, 381 F.2d 306, cert. den. 389 U.S. 1053, the court declined to base its holding on *Burdeau*, finding instead that the evidence in question had not been stolen. Finally in *N.L.R.B.* v. *South Bay Daily Breeze* (9th Cir. 1969), 415 F.2d 360, the court discussed the applicability of *Burdeau*, but concluded that the Fourth Amendment did not apply to proceedings before the National Labor Relations Board.

Several state courts, while ostensibly applying the *Burdeau* rule, have also expressed doubts as to its continued efficacy. See, e.g. *People* v. *Williams*, 53 Misc.2d 1086; 281 N.Y.S.2d 251; *People* v. *Botts*, 250 Cal.App.2d 478, 58 Ca.Rptr. 412.

The same considerations which caused this Court to invoke its supervisory power in *Elkins* apply to the instant situation. There can be no rational distinction, in terms of harm to the integrity of the judicial system, between the use of evidence unlawfully seized by a state official, and evidence unlawfully seized by a private party. The uncertainty among the circuits on this question, and the dis-

inclination on the part of even those circuits ostensibly following *Burdeau* to rest a holding squarely upon that case, illustrate the importance of a resolution of this issue to the administration of criminal justice.

This case presents an appropriate factual arena for a reconsideration of *Burdeau* v. *McDowell*. As the lower court recognized, the facts of this case closely parallel those of *Burdeau*. (See Appendix A, p. 4.) As in *Burdeau*, records of the defendant's business enterprise were stolen by an employee, and ultimately turned over to the government for use in a criminal prosecution. We ask that this Court consider whether, consistent with its decision in *Elkins* v. *United States*, it can countenance such a practice.

CONCLUSION

For the above and foregoing reasons, we respectfully submit that a writ of certiorari should be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case.

Respectfully submitted,

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APPENDIX

APPENDIX A.

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1971 — SEPTEMBER SESSION, 1971

No. 18846

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT HARPER,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

Crim. No. 69 H 42 George N. Beamer, Judge.

NOVEMBER 10, 1971

Before DUFFY, *Senior Circuit Judge,* and KILEY and KERNER, *Circuit Judges.*

KERNER, *Circuit Judge.* Appellant, Robert Harper, and a co-defendant, Thomas Upshaw, were indicted on eleven counts charging that they knowingly subscribed false Internal Revenue Service Form 730s in violation of 26

U.S.C. §7206(1) and 18 U.S.C. §2. In a trial without a jury, Harper was convicted on each of the eleven counts and Upshaw was acquitted. Harper now appeals his conviction.

The false Form 730s, or wagering tax forms as they are more common known, were filed monthly by a "policy" or "numbers" operation known as Tri-State Enterprises. Tri-State, during the eleven months covered by the indictment, was managed by the defendant.

The government's proof consisted of testimony by two witnesses and certain business records taken from Tri-State by Mattie Turnipseed, a former Tri-State employee. Mrs. Turnipseed testified that it was Tri-State's practice to conduct three daily drawings to determine winning numbers, and that she, as bookkeeper, kept a detailed record of the operation's transactions. The bookkeeping system was not complicated. A clerk kept a duplicate running record showing the money brought in for bets, the "hits" by bettors and the initials of the "pick-up men" who solicited the bets. That record was totaled after each drawing and a copy given to both Mattie Turnipseed and the defendant. Mrs. Turnipseed would use this record to compile the daily and weekly wagering totals. These figures were also given to the defendant and would serve as the basis upon which he computed the weekly payroll for the "pick-up men."

The questioned wagering tax returns were prepared monthly by an accounting firm which the defendant had retained. An accountant from the firm testified that the information used in making the returns was supplied each month by Tri-State Enterprises. He was unable to say by whom the information was delivered. We note, additionally, that it is unclear from the record whether

the forms were prepared by the firm prior to the defendant's signing them or whether he pre-signed them. It is, however, undisputed that Harper signed the forms and the accompanying checks.

The records, which are the basis for the defendant's primary attack upon his conviction, were introduced at trial to show the difference between the actual gross wagering receipts and the amount reported. It appears that Mattie Turnipseed retained her copies of gross receipt records and took them with her when she left the employ of Tri-State. Eight months after leaving, she was contacted by two special agents from the Internal Revenue Service and her cooperation was requested in connection with their investigation of Tri-State Enterprises. While the agents were unaware of the existence of the records when they initially contacted her, upon discovery that she had records which would be useful in their investigation, they agreed that in exchange for the records, she would be granted immunity from any prosecution for her prior connection with Tri-State.

In seeking reversal of the conviction, the defendant argues that his right to privacy, as guaranteed by the Fourth Amendment, was violated by the government's procurement of the records. Pre-trial suppression of the records was refused by the district court and they were admitted to show a discrepancy of $1,982,261.77 in Tri-State's actual gross wagering receipts and the amount reported.[1] The defendant now urges that this information,

[1] The records turned over to the government show that the gross receipts of Tri-State's numbers operation totalled $2,170,341.77 for the eleven-month period. By comparison, the wagering tax forms signed by appellant Harper indicate gross receipts of only $188,080.00, a difference of $1,982,261.77. The tax actually paid on the amount originally reported was $18,808.00, whereas the amount of tax which should have been paid was $217,034.18.

serving as it does as the basis for his conviction, should have been excluded as the fruit of an unlawful search. We do not agree.

In *Burdeau* v. *McDowell*, 256 U.S. 465, 467 (1921), the Supreme Court held that "the Fourth Amendment protects only against searches and seizures which are made under governmental authority, real or assumed, or under color of such authority" and that the exclusionary machinery of the Fourth Amendment could not be employed to limit the admissibility of evidence seized by private individuals. The factual setting of *Burdeau* is closely analogous to that before us. There, the defendant sought to have suppressed incriminating evidence which had been wrongfully seized from his office by private corporate officials and their private investigators. That information had subsequently been turned over to the government for use in a criminal prosecution. Concluding, as we do here, that the seizure had been entirely independent of government involvement, the Supreme Court rejected the defendant's invocation of the Fourth Amendment.

> The papers having come into the possession of the Government without a violation of petitioner's rights by governmental authority, we see no reason why the fact that individuals, unconnected with the Government, may have taken them, should prevent them from being held for use in prosecuting an offense where the documents are of an incriminatory character... *Burdeau* v. *McDowell*, 256 U.S. 465 at 476.

Although the decision in *Burdeau* has been challenged several times following the Supreme Court's decision in *Elkins* v. *United States*, 364 U.S. 206, 80 S. Ct. 1437

(1960),[2] see *United States* v. *McGuire*, 381 F. 2d 306, 313-14 (2d Cir. 1967), cert. denied 389 U.S. 1053, 88 S. Ct. 800 (1968), it has not been overruled. *N.L.R.B.* v. *South Bay Daily Breeze*, 415 F. 2d 360, 363 (9th Cir. 1969). The defendant directs our attention to the opinion of this court in *Knoll Associates, Inc.* v. *F.T.C.*, 397 F. 2d 530 (7th Cir. 1968), urging that decision as authority for the application of the Fourth Amendment in this case. *Knoll Associates*, however, neither diminishes nor alters the *Burdeau* rationale. Indeed, as this court noted in the *Knoll* opinion, "the facts in this case are the antithesis of those in *Burdeau*," at p. 536, n. 5. In a case with a factual situation remarkably similar to the one before us, *N.L.R.B. v. South Bay Dailey Breeze, supra*, the Ninth Circuit correctly distinguished *Knoll Associates* from *Burdeau*:

> A recent decision by the Seventh Circuit, *Knoll Associates, Inc.* v. *F.T.C.*, 397 F. 2d 530 (7th Cir. 1968), is not inconsistent with our reading of Burdeau. While there holding that evidence illegally seized by an employee should not have been admitted because of Fourth Amendment violations, the court stated that, "[t]he undisputed evidence shows that [the disloyal employee] stole the documents for the purpose of assisting the Commission counsel in the prosecution of the proceeding then pending, and the rec-

[2] While the argument has been occasionally made that the decision in *Elkins* holding inadmissible in federal courts evidence seized by state officers in an unreasonable and unlawful manner (the "silver platter doctrine") has extended the Fourth Amendment's protection against unreasonable searches to unlawful private searches and thereby overturned the rule announced in *Burdeau*, no court has looked upon this contention with favor. *United States* v. *Goldberg*, 330 F. 2d 30 (3d Cir. 1964), cert. denied, 377 U.S. 953 (1964) *United States* v. *McGuire, supra*, at 314; 36 ALR 3d 553, 558.

ord shows that the Commission by its use of the documents knowingly gave its approval to [the employee's] act." *Id.* at 533. This is conduct not countenanced by *Burdeau*, where the Court made pointed reference to the fact that government action was not present in the taking. 256 U.S. at 476, 41 S. Ct. 574, 65 L.Ed. 1048.

In *Knoll*, *supra*, the actions of the government and the thief were so related as to make the thief a government agent and his conduct unacceptable under long standing Fourth Amendment grounds. *Gambino v. United States*, 275 U.S. 310, 48 S. Ct. 137, 72 L.Ed. 293 (1927).

N.L.R.B. v. *South Bay Daily Breeze*, 415 F. 2d 360 at 363.

The same distinction applies to the facts of this case. Mattie Turnipseed obtained the records upon her own volition without any contact with or pressure from the government agents. Indeed, the records were acquired eight months prior to her first contact with the agents. In such a situation, the Fourth Amendment does not require that the evidence be excluded.

Having determined that the Tri-State records were properly admitted, we turn now to the question of whether the verdict was supported by the evidence. The defendant asserts that the government has failed to meet its burden of proof in that the evidence considered in the light most favorable to the government fails to prove beyond a reasonable doubt that the defendant believed or knew that the tax wagering forms were not accurate.

Harper was indicted under 26 U.S.C. § 7206(1)[3] which makes it a crime to subscribe any return which the subscribing party "does not believe to be true and correct as to every material matter." To sustain a conviction under this section, the government must prove that Harper signed the tax returns which he did not believe to accurately reflect gross wagering receipts of Tri-State Enterprises. While it is undisputed that Harper signed the returns and that they grossly understated the gross wagering receipts of Tri-State, it is urged that the proof failed to establish that Harper knew or believed that they were false. To support this contention, the defendant points to the fact that the accountant was not certain whether Harper had ever personally delivered the information used by the accounting firm to complete the tax forms. In addition, he argues that the fact that the record was unclear as to whether the forms were presigned renders the question of knowledge doubtful.

We find that neither of these facts, taken alone or jointly, is determinative of the question of Harper's knowledge or belief that the returns were inaccurate. While it is true that proof of a signature alone on a tax return is insufficient by itself to make knowledge of the contents of that return attributable to the signor, *United States* v. *Bass*, 425 F. 2d 161 (7th Cir. 1970); *Lurding* v. *United States*, 179 F. 2d 419 (6th Cir. 1950), it is

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[3] Section 7206(1) of the United States Code states:

Any person who —

(1) *Declaration under penalties of perjury.*—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; . . .

equally true that knowledge may be inferred from the facts and circumstances of the case and that the signature at the bottom of the return is *prima facie* evidence that the signor knows the contents of the return. *Bass, supra,* at 163.

We note that Harper was given a copy of the total receipts for each drawing after such drawing was made. Further, we note that the weekly totals of Tri-State's gross receipts as compiled by Mattie Turnipseed were given to Harper and that he used these totals to prepare the weekly payroll for the "pick-up men." These facts, when coupled with the testimony that Harper ran the operation, hired the accounting firm which prepared the tax forms and paid the tax on the amounts actually reported, lead inescapably to the conclusion that Harper knew the forms were incorrect. We are not dealing with a small discrepancy between the amount reported and the amount actually due. Indeed, the disparity is enormous, totalling $1,982,261.77. It is inconceivable that the active manager of a business concern, who was supplied with both daily and weekly gross receipt totals, would not be aware of a disparity of this magnitude.

The fact that Harper may not have personally delivered the information to the accountants is not determinative of the issue of wilfulness. We cannot accept his attempt to escape culpability behind this assertion of ignorance. As the First Circuit noted in *Katz* v. *United States,* 321 F. 2d 7 (1st Cir. 1963) at 10:

> A return is not short of wilful falsity because the taxpayer chooses to keep himself uninformed as to the full extent that it is insufficient, or as to what exact figures should have been inserted. Innocence cannot outdistance ignorance.

In view of our finding that the incriminating evidence was properly obtained by the government and that it was sufficient to sustain the conviction, we affirm the district court.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

November 10, 1971

Before

Hon. F. Ryan Duffy, *Senior Circuit Judge*
Hon. Roger J. Kiley, *Circuit Judge*
Hon. Otto Kerner, *Circuit Judge*

No. 18846

United States of America,

Plaintiff-Appellee,

vs.

Robert Harper,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby,

Affirmed.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 14, 1972

Before
Hon. F. Ryan Duffy, *Sr. Circuit Judge*
Hon. Roger J. Kiley, *Circuit Judge*

No. 18846

United States of America,

Plaintiff-Appellee,

vs.

Robert Harper,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and a majority of the members of the panel having voted to deny a rehearing,

It Is Ordered that the petition for a rehearing in the above-entitled case be and the same is hereby denied.

Judge Kerner participated in the decision of this case but did not participate in the consideration of the petition for rehearing.

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No. 71-1165

In the Supreme Court of the United States

OCTOBER TERM, 1971

ROBERT HARPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1165

ROBERT HARPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury-waived trial in the United States District Court for the Northern District of Indiana, petitioner was convicted on eleven counts of having knowingly subscribed false revenue forms to the Internal Revenue Service, in violation of 26 U.S.C. 7206(1). He was sentenced to five years' imprisonment to be followed by an equal period of probation. The court of appeals affirmed (Pet. App. A).

Petitioner's sole contention here is that this Court should reexamine and overrule its decision in *Bur-*

deau v. *McDowell*, 256 U.S. 465, which held that the Fourth Amendment did not require exclusion of evidence stolen by a private person without involvement of the government where the evidence was thereafter turned over to the government for its use. Petitioner's argument is that the rationale of *Burdeau* was undermined by *Elkins* v. *United States*, 364 U.S. 206, 222, where the Court spoke not only of the dominant deterrent purpose of the Fourth Amendment exclusionary rule but also of the "imperative of judicial integrity." See also *Terry* v. *Ohio*, 392 U.S. 1, 12-13.

The opinion of the court below, on which we rely, answers petitioner's claim (see Pet. App. A 4-6). We further point out that the courts of appeals after *Elkins* have uniformly rejected attacks upon *Burdeau*, and this Court has consistently denied review. See *United States* v. *Goldberg*, 330 F.2d 30 (C.A. 3), certiorari denied, 377 U.S. 953; *United States* v. *McGuire*, 381 F.2d 306, 312-314 (C.A. 2), certiorari denied, 389 U.S. 1053; *United States* v. *Winbush*, 428 F.2d 357 (C.A. 6), certiorari denied, 400 U.S. 918.[1] Nor has the essential basis of *Burdeau*—that the Fourth Amendment was designed to protect only against searches and seizures involving govern-

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[1] *Williams* v. *United States*, 282 F.2d 940 (C.A. 6), cited by petitioner (Pet. 7), is not to the contrary, since in that case the court of appeals simply applied *Elkins* to a search by state officers. Moreover, the Sixth Circuit subsequent to *Williams* has specifically indicated that *Burdeau* retains vitality. See *Winbush*, *supra*; *United States* v. *Hodges*, 448 F.2d 1309, 1312 (C.A. 6).

mental action—been impaired by any subsequent decision of this Court. Cf. *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388; see *United States* v. *Callaway*, 446 F.2d 753, 755 (C.A. 3), certiorari denied *sub nom. De Vyver* v. *United States*, January 10, 1972 (No. 71-5424) (holding that searches by foreign officers outside the United States do not come within the protection of the Fourth Amendment). Petition offers no reason why the Court should take a different approach in this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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